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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 453

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

WABASH RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY AND ILLINOIS TERMINAL RAILROAD COMPANY; A. E. STALEY MANUFACTURING COMPANY,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

A. E. Staley Manufacturing Company, intervener appellee, petitions for a rehearing, pursuant to Rule 33, of the decision entered March 27, 1944, reversing the decree

of the statutory court below; and in that behalf petitioner states:

Petitioner does not seek reconsideration or modification of the two basic conclusions stated by the Court and asks that the Court shall clarify its decision and modify the terms, to the end that the decree of the Court below shall not be reversed nor the underlying orders of the Interstate Commerce Commission confirmed.

First, petitioner accepts the decision of March 27, 1944, as reaffirming the doctrines of *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, that the Commission has authority to determine "what is embraced within the service of transportation and what lies outside that service"; where the transportation begins and ends, or what constitutes a reasonably convenient place for receipt and delivery of freight at plants, large or small; further, that each case must be determined upon the particular facts, within the Commission's discretion exercising its administrative powers. As explained below, petitioner questions whether the Court intends to hold that the Commission may declare transportation ended at a place inaccessible to the consignee and contrary to express statutory provisions.

Second, petitioner accepts the Court's conclusion that these matters are determined by Section 6 (7) of the Interstate Commerce Act, so that the Commission's order which in substance requires assessment of a spotting charge against Staley is not invalid because such charge has not been required also at competing plants under like circumstances.

Petitioner is asking the Court to consider a question presented in brief and argument, not reviewed in the Court's opinion and which involves important matters of

fact that are not correctly reflected in the opinion of the Court.

This question relates to clauses in the Commission's findings, incorporated in its order, which prohibit respondent carriers from according Staley any delivery of carload freight beyond a point in the general yards of the Wabash Railroad, a substantial distance away from the Staley plant. This is error, under the *American Sheet & Tin Plate* doctrine; and the error is of peculiar force as related to the large grain traffic moving to and from the Staley merchant elevators. The effect of the Commission's order is to deny Staley Company any delivery of grain under the freight rate.

I.

The Court's opinion after referring to the size of the Staley plants and the movement of cars between the interchange tracks and points of loading and unloading (under former methods), recites (pp. 4-5):

> "Contentions of appellees based on a formal change of control of the interchange tracks by lease from the Staley Company to appellee Wabash Railroad executed subsequent to the Commission's report in *Ex parte* 104, are irrelevant to our present inquiry. After the lease, as before, they continued to be used as interchange tracks and the controlling question is whether the movement from the interchange tracks to points of loading and unloading is a plant service for the convenience of the industry, or a part of the carrier service comparable to the usual car delivery at a team track or siding. The Commission's finding that it is a plant service is supported by evidence and must be accepted as conclusive here.
>
> "Appellees make no other serious contention of want of evidentiary support for the Commission's conclusion that the carrier service ended at the interchange tracks and the District Court found no such lack."

The facts are not as stated but have changed, see below. Nowhere in the opinion is there discovered recognition of the fact that the interchange tracks *are no longer in existence,* and no placements are first made thereon, but all cars, whether grain or other freight, move to and from Wabash Railroad yards from and to various unloading or loading points within the Staley plant.

The Commission's findings and conclusion appears to have been skillfully drawn so as to require continued imposition of the $2.50 charge on cars moving *directly* to and from the Staley plant, even as to the grain which is simply shunted in strings of ten or more cars and subsequently placed by Staley at its elevator chutes through the medium of plant-operated car pullers. The findings read (R. 43) (*our italics*):

> "2. That all services between the Burwell yard *or the storage or general yard of the Wabash* and points of loading or unloading within the plant area of the Staley Company are plant services for the Staley Company and not common-carrier services covered by the line-haul rates and charges of respondent carriers.
>
> "3. That the performance by respondents, without charge in addition to the line-haul rates and charges, of service (a) from Burwell yard tracks to points of unloading within the plant area of the Staley Company (b) from points of loading within said plant area to Burwell yard tracks on loaded cars moved to that yard, and (c) from points of loading within said plant area *to Wabash storage or general yard tracks* on loaded cars that do not move to the Burwell yard, would result in the Staley Company receiving a preferential service not accorded to shippers generally and would result in the refunding or remitting of a portion of the rates and charges collected or received as compensation for the transportation of property in violation of section 6 (7) of the act."

As a matter of law, which only this Court may finally determine petitioner must concede that perhaps there is

some testimony that would support a finding that as to general commodities there may be services of car movements within the Staley plant which are not carrier services. But this is certainly not so as regards grain to (and from) the elevator. These ~~more~~ move direct from the railroad inspection tracks in their yards to a point just off the Wabash right of way in the Staley plant. (R. 256)

There was an important change in the facts subsequent to the last hearing by the Commission, April 23, 1940 (R. 370), and prior to the final order of May 6, 1941. This change was the discontinuance of any and all use of the interchange tracks (known as Burwell yards) and later the removal of those tracks, which no longer have physical existence. Not only was the cessation of use called to the Commission's attention in printed exceptions preceding its final report; this and the dismantling of the tracks was made the express subject of petitions for rehearing by the respondent carriers and by the Staley Company: By the Illinois Central (R. 51); the Wabash (R. 61); by Staley (R. 69). These petitions for rehearing the Commission denied by order of July 31, 1941 (R. 8) before the suit to set aside its order was instituted.

II.

In the brief for intervener-appellee, under point II, the Court's attention was invited to the effect of the provisions of the constitution and statute of the State of Illinois (supplementing Federal law), requiring inspection of grain moving by railroad and requiring also the delivery of the grain by the carrier to any elevator, physically accessible to railroad locomotives. Further, notice was called to the application of the doctrines of this Court in *Great Northern*

Railway Company v. *Merchants Elevator Company*, 259 U. S. 285, to the facts of this present case.

Petitioner is mindful that in *United States* v. *American Sheet & Tinplate Co.* case, *supra*, the Court said:

> "There is no custom or practice which has the force of a rule of law that the line-haul rate includes plant spotting service."

The Court also said:

> "It is conceded that the line-haul rate covers delivery."

The requirements of the statutes as to grain inspection and delivery in Illinois (as indeed in other states) are incompatible with any suggestion or claim that the railroads have not universally made deliveries at unloading chutes of elevators. Accordingly, whether or not the Illinois statutes and constitution may be held of binding force against the Interstate Commerce Commission, petitioner urges that the Court should accept such requirements of law, fortified by the abundant testimony of this record, as establishing that with respect to grain there is undoubtedly a general custom and usage amounting to a rule of law. This custom is that after required state inspection in railroad yards, the cars of grain are placed at the elevator under the compensation furnished by the freight rate. *This is universally true.*

In this case, Staley is being required to pay $2.50 per car charge (not imposed on any other grain concern by respondent carriers) where the railroads simply deliver strings of cars of grain clear of their property on tracks just within the plant leading to the elevator and later Staley completes the movement by car puller device to the unloading chutes.

In *Great Northern Railway Co.* v. *Merchants Elevator Co., supra,* the Court concluded, as a matter of law, that in construing a railroad tariff under Section 6 of the Act, the inspection point is not the real destination of a shipment of grain, but the elevator where the grain is subsequently unloaded. It will be noted, therefore, that the determination of what is the delivery point on grain involves construction of a statute, which is not an administrative function for the Commission but is a legal question for the courts.

After counsel for petitioners had urged this point on oral argument, counsel for the Government, in reply to a question from the bench, swept it aside with the remark that it had been raised at the last minute to confuse the record. The point was argued orally and in brief before the District Court in this case; and the facts were fully developed in the underlying record before the Commission.

III.

Petitioner would greatly hesitate to accept an interpretation of the doctrine of *United States* v. *American Sheet & Tinplate Co.,* reaffirmed in the present case to mean that the authority of the Commission to determine where transportation ends extends to declaring its termination at a point where *as a physical fact* the cars are inaccessible to the consignee at destination, or from a point of origin where the consignor could not get to the cars for loading. Particularly does this seem an undue stretching of the Court's recognition of the Commission power, when viewed in the light of the express provision of Section 1 (3) of the Interstate Commerce Act:

> "The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels,

and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

Petitioner prefers to interpret the Court's conclusion as embodying the idea that the Commission's authority does not extend to disregarding usages and requirements of law, such as grain inspection statutes, or that the Commission is relieved of the need for having some substantial evidence that the place which it designates as marking the end (or beginning) of the transportation obligation is one where the shipper may actually take delivery and receive or tender the goods. Such place cannot be within a general railroad yard, as the Commission findings herein contemplate. As a matter of good sense, it would seem the transportation obligation, under the rate, must extend to a point at least immediately beyond the carrier's right of way. As a matter of law, strictly according to the substantive provisions of Section 6 of the Act, the principles of *Great Northern Railway Company* v. *Merchants Elevator Company, supra,* this is clearly the obligation with respect to grain.

IV.

The decree of the Court below and the contention of the appellees extended to the matters herein discussed; and these seem to be overlooked by this Court, particularly in the statements quoted from pp. 4-5 of the opinion, to the effect that there is no serious contention of want of evidentiary support of the Commission's order.

Petitioner prays that the Court will reconsider its re-

versal of the decree of the Court below and approval of the underlying order of the Commission and instead shall affirm the decree in part or remand with instructions for further proceedings in harmony with the Court's final conclusions.

Chicago, April 24, 1944.

Respectfully submitted,

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AFFIDAVIT

I, John S. Burchmore, counsel for petitioner, A. E. Staley Manufacturing Company, certify that the foregoing petition is presented in good faith, is true and correct, and is not filed for delay.

JOHN S. BURCHMORE.